

82 - 1020

NO.

Office-Supreme Court, U.S.

F I L E D

DEC 16 1982

ALEXANDER L STEVAS,
CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1982

TINY SMITH, Petitioner,

versus

SOUTHERN RAILWAY COMPANY, Respondent

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
CIVIL CASE**

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QUESTIONS PRESENTED

1. May a court of appeals, consistent with Rule 50(a) of the Federal Rules of Civil Procedure requiring that "A motion for a directed verdict shall state the specific ground therefor," reverse the trial judge's denial of a defendant's motions for a directed verdict and judgment notwithstanding the verdict on a ground not stated nor specified in defendant's motion?
2. May a court of appeals reverse a judgment and direct entry of judgment in favor of the losing defendant in the district court by applying to the facts a legal theory other than the one on which the parties proceeded in the district court?
3. May a court of appeals,

QUESTIONS PRESENTED (Continued)

consistent with the Seventh Amendment's guarantee of a right to jury trial, direct entry of judgment for a defendant notwithstanding its finding that the evidence is conflicting on the crucial issue raised (1) by the legal theory on which the parties proceeded in the trial court and (2) by the new and different legal theory upon which the court below proceeded to reverse?

The caption of the case contains the names of all parties.

TABLE OF CONTENTS

	<u>Page</u>
Questions Presented	i
Opinions Below	1
Jurisdictional Statement	2
Constitutional and Statutory Provisions Involved	2
Statement of Case	4
Reasons for Granting the Writ of Certiorari	19
1. The decision herein is not in accord with applicable decisions of this Court	19
A. The Court below does not have the power to direct a verdict for an unsuccessful de- fendant in the District Court on a ground neither specified nor stated in defendant's motion for a directed verdict	20
B. The Court below does not have the power to reverse the ruling of	

TABLE OF CONTENTS (Continued)

	<u>Page</u>
a district judge or a verdict of a jury and direct entry of judgment for a losing defendant on a new and different theory of defense from that raised or asserted in the trial court . . .	24
C, The Court below does not have the power to weigh con- flicting inferences and judge the credi- bility of witnesses . .	27
Conclusion	34
Appendix	35
Index to Appendix	
Order of District Judge Denying Motion for Judg- ment Notwithstanding the Verdict	36
Decision of Court of Appeals for Fourth Cir- cuit Reversing Judgment of District Court	50
Petition for Rehearing . . .	78

TABLE OF CONTENTS (Continued)

	<u>Page</u>
Appendix to Petition for Rehearing	87
Excerpt from Reporter's Transcript of Defendant's Motion for Directed Verdict, Arguments Thereon and Ruling of District Judge Denying Motion	88
Excerpt from Defendant's Motion for Judgment n.o.v. and New Trial	126
Order Denying Petition for Rehearing	128
Judgment of United States Court of Appeals	129

TABLE OF AUTHORITIES

	<u>Page</u>
American Lease Plans v. Houghton Construction Co., Inc., 492 F. 2d 34 (5th Cir. 1973)	25
Bates v. Coe, 98 U.S. 31 (1878) . .	25
Bell v. Bruen, 42 U.S. 169 (1843) .	25
Bramlett v. Young, 229 S.C. 519; 93 S.E. 2d 873 (1956)	25

TABLE OF AUTHORITIES (Continued)

	<u>Page</u>
Canal & C.S.R. Co. v. Hart , 114 U.S. 654 (1885).....	24
Cone v. West Virginia Pulp & Paper Co. , 330 U.S. 212 (1947)..	21
Fountain v. Filson , 336 U.S. 681 (1949).....	21
Gardner v. Myers , 491 F.2d 1184 (8th Cir. 1974).....	25
Globe Liquor Co. v. San Roman , 332 U.S. 571 (1948).....	21
Johnson v. N.Y., N.H. & H.R.R. Co. , 344 U.S. 48 (1952).....	21
Lavender v. Kurn , 327 U.S. 645 (1946).....	30
Morrill v. Jones , 106 U.S. 466 (1883).....	24
Prosser v. Parsons , 245 S.C. 493; 141 S.E.2d 342 (1965)....	10
Quock Ting v. U.S. , 140 U.S. 417.....	31
Sartor v. Arkansas Natural Gas Corp. , 321 U.S. 620 (1944)....	30, 31

TABLE OF AUTHORITIES (Continued)

	<u>Page</u>
Tennant v. Peoria & Pekin Union R. Co., 321 U.S. 29 (1944).....	30
U.S. v. Le Baron, 60 U.S. 73 (1856).....	25
Wagner v. Retail Credit Co., 338 F.2d 598 (7th Cir. 1964)....	25
Weade v. Dichmann, Wright & Pugh, Inc., 337 U.S. 801 (1949)..	24
Wilkerson v. McCarthy, 336 U.S. 53 (1949).....	30

OTHER REFERENCES

United States Constitution, 7th Amendment.....	2, 28
Rule 50, Federal Rules of Civil Procedure.....	3, 19, 22, 23

NO.

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TINY SMITH, Petitioner,

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PETITION FOR A WRIT OF CERTIORARI TO
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FOR THE FOURTH CIRCUIT
CIVIL CASE

The petitioner prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit, dated September 20, 1982 and final judgment entered thereon on November 8, 1982.

OPINIONS BELOW

The opinion of the District Court

(App. 36) is unreported. The opinion of the Court of Appeals (App.50) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on September 20, 1982. Petition for rehearing was filed on September 29, 1982 (App.78) and denied October 22, 1982 (App.128). Final judgment was entered on November 8, 1982 (App.129). The jurisdiction of this Court is invoked under the provisions of 28 U.S.C 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U. S. Constitution, Amendment VII

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law.

STATUTORY PROVISIONS INVOLVED

Rule 50 of the Federal Rules of Civil Procedure.

"Rule 50. Motion for a Directed Verdict and for Judgment Not-withstanding the Verdict.

(a) Motion for Directed Verdict:

When Made; Effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the

specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury."

STATEMENT OF THE CASE

Petitioner, Tiny Smith, a resident of South Carolina, brought suit against respondent, Southern Railway Company, a Virginia corporation, for whom he had been working as an independent contractor for approximately twenty years, to recover damages on five causes of action: two for maliciously instigating criminal prosecutions against petitioner for mail fraud without probable cause in failing to make a full, fair and accurate disclosure of material facts to the prosecuting authorities; one for tortious interference with a contractual relationship which petitioner

had with his employer; and two for malicious abuse of process.

The causes of action for malicious abuse of process were eliminated by summary judgment, and the remaining causes of action came on for trial before The Honorable Falcon B. Hawkins, United States District Judge, and a jury.

The following evidence in support of petitioner's causes of action was adduced at trial. Petitioner was employed by respondent railway company as an independent contractor for a number of years during which he performed railroad construction work. He was also designated as a "vendor" of respondent to handle its billings for the purchase by respondent of goods and equipment. All billing for work and purchases were

handled by petitioner in accordance with instructions from officers of respondent railway company - a common practice of the respondent company which existed ever since plaintiff commenced work with it some twenty years ago.

The common practice of billing used by the respondent company, as reflected in the record and described by the District Judge in his order denying respondent's motion for judgment notwithstanding the verdict and new trial, was such that oftentimes when independent contractors, including petitioner, were hired by respondent to perform certain kinds of work at specific locations for which no funds were budgeted, or if budgeted, were exhausted or depleted, respondent's officers and agents, in order

to avoid delay, keep the trains moving and at times to avoid union problems, would instruct and require such independent contractors, including petitioner, to prepare and submit invoices, as was done in this case, reflecting that services of a different kind were performed at locations different from where the services were actually performed. In a number of instances when such instructions were not complied with, personnel in respondent's accounting office would return the invoices to petitioner requiring changes in accordance with the instructions.

With regard to the practice of billing for purchases, it was such that for the convenience of respondent railway company which used a system of approved vendors, contractors such as the

petitioner, who were on the list of approved vendors, would make purchases of materials or equipment to be used by respondent company from suppliers not listed on the approved vendor list. The supplies would be furnished by the supplier directly to respondent company, without any contact with or any information furnished to the contractor as to delivery, and the supplier would bill the contractor (an approved vendor) who would pay the invoice and in turn submit his own invoice, with an added charge for handling, to the respondent company for reimbursement.

The purpose of this practice was to cause the payment for the costs of services and equipment to be made from accounts having a surplus or excess of

funds where otherwise the costs would be chargeable to accounts from which the funds have been depleted.

In 1976, respondent's agents instigated criminal prosecutions against petitioner by placing before the prosecuting authorities information that he submitted fraudulent invoices through the mails for an air conditioner which was not received by respondent and for work performed at locations at which it was undisputed that neither petitioner nor any of his employees were present. However, respondent's agents, in laying this information before the prosecuting authorities, failed to make a full, fair, complete and accurate disclosure of the material exculpatory fact of respondent's billing practices, as required in

Prosser v. Parsons, 245 S.C. 493, 141 S.E. 2d 342 (1965). Petitioner was then approached by respondent's railway police and a postal inspector. He was told that they had the goods on him, but he would not be prosecuted if he would sign a statement containing facts criminally implicating employees of respondent, of which petitioner had no knowledge or information. He attempted to explain the accusations against him and refused to sign the statement, whereupon he was threatened with a jail sentence. He was thereafter twice forced to trial. The exculpatory information explanatory of petitioner's absence from the locations described in the invoices and his billing methods for the purchase of equipment, if known to the prosecutor, would

have required further investigation by him before seeking the indictments against petitioner on which he was tried and acquitted at both trials.

The crucial issue thus presented by the theory on which both parties proceeded in the trial court was whether the billing methods of respondent as described above, which includes what is known as "job swapping," was a common practice. If so, it was evidence of lack of probable cause from which malice is inferred in accordance with South Carolina law, and since it was not disclosed by respondent to the prosecutor, it would support the verdict of the jury on all causes of action; if it did not exist, then all of petitioner's causes of action must fail.

Petitioner testified and produced evidence from numerous witnesses, including present and former employees and officers of respondent company, that the billing procedures described above existed as a common practice of the respondent; and respondent, on the other hand, produced witnesses who testified that the alleged practice did not exist.

At the close of the evidence respondent moved for a directed verdict as to all causes of action on the ground that the alleged common practice of respondent's billing was non-existent from which it followed that there was no exculpatory information that could have been disclosed to the prosecuting authorities and therefore respondent acted with probable cause in instigating

the criminal prosecutions and with justification in causing petitioner's discharge from employment.

The motion was denied after full consideration by the District Judge, as appears by reference to the Appendix to the petition for rehearing (App. 88-124).

The case was submitted to the jury for its determination which brought in verdicts in favor of the petitioner on each cause of action for damages as follows: On the first cause of action for malicious prosecution - \$263,000.00 actual damages and \$248,000.00 punitive damages; on the second cause of action for malicious prosecution - \$219,000.00 actual damages and \$279,000.00 punitive damages; and on the third cause of action for tortious interference with an

employment contract - \$8,150.00 actual damages and \$339,000.00 punitive damages.

Respondent duly filed a motion for judgment notwithstanding the verdict on the grounds urged in its motion for a directed verdict. In refusing the motion, the District Judge held that the evidence on the theory on which the parties proceeded at trial presented questions of fact properly determinable by a jury. In so holding, he aptly stated:

"The evidence was sufficient to withstand defendant's motion for directed verdicts as to all causes of action. The testimony adduced at trial and the reasonable inferences therefrom, although conflicting in some areas, presented questions of fact properly determinable by a jury. This clearly appears in light of the following evidence of record: defendant's threat of a jail sentence against plaintiff for refusing to sign a statement containing facts of which plaintiff had no knowledge

or information; the instigation by defendant's officers of two successive criminal prosecutions against plaintiff; the subsequent indictment, trials and arrests; the information laid before defendant's officers before the Postal Inspector and Assistant U. S. Attorney used as the basis for commencing and proceeding with the criminal prosecutions; the billing practices of defendant requiring independent contractors, including plaintiff, to invoice for work performed at specific sites to the budget accounts of the defendant set aside for the payment of work at different other sites; the billing practices of defendant relating to the purchases of supplies whereby suppliers were required to submit invoices only to company designated vendors, of which plaintiff was one, who in turn paid the invoices themselves, prepared their own invoices and then sent them to the defendant for payment without having any contact with the supplier or personal knowledge of whether the supplies were delivered to the defendant company; the conduct of defendant's officers, when laying the information before the Postal Inspector and Assistant U. S. Attorney for prosecution, in withholding and failing to make a full, fair, accurate and complete disclosure

of material exculpatory facts, particularly concerning the billing practices of defendant; the mutually satisfactory contractual relationship between plaintiff and his employer; the interference by defendant's agent with plaintiff's employment and the termination of such employment by reason of such interference, together with the other evidence of record. These were all facts and circumstances which presented factual questions as to each cause of action which were properly submitted to the jury for its determination."

On appeal the Court of Appeals reversed the District Court's denial of respondent's motion for judgment notwithstanding the verdict by applying to the facts a legal theory other than the one on which the parties proceeded in the trial court and on a ground neither specified nor stated in respondent's motions for a directed verdict and judgment notwithstanding the verdict.

It determined, however, that as to the theory on which the parties tried the case in the trial court, there was a conflict in the evidence on the issue of whether or not the billing procedures of respondent, which includes what is described as "job swapping," was a common practice.

The Court of Appeals did not stop there, however. Notwithstanding its determination that there was a conflict in the evidence presented as to the crucial issue of whether or not respondent's billing procedures was a common practice, it proceeded to weigh the testimony and then reversed by applying a new theory and ground, to wit, that the railway police did not know of the billing practice. It reached a factual finding that "so far as a company practice goes, the facts simply

do not support the conclusion that the railway police knew of the practice, even if it in fact existed, prior to the indictment." This case was neither tried in the District Court on the theory applied by the Court of Appeals nor was this ground specified or stated in respondent's motions at trial. Yet, nowhere in its otherwise detailed opinion was there any discussion of the propriety of deciding the case on a new theory nor of any rationale for absolving the respondent railway company, whose agents were active participants in the billing practice, from liability for failing to make a full, fair, complete disclosure to the prosecuting authorities of material facts exculpatory of petitioner's guilt merely because its railway police allegedly did not have knowledge

of the billing procedures, and notwithstanding the evidence of record that the railway police on several occasions were active participants in this practice.

(App.56, 61).

Petition for rehearing was filed (App.78) but was denied by the Court below on the 22nd day of October, 1982. (App.128).

REASONS FOR GRANTING THE WRIT

1. The decision herein is not in accord with applicable decisions of this Court: The issues in this case are (1) whether a Court of Appeals, consistent with Rule 50 (a) of the Federal Rules of Civil Procedure, has the power to direct a verdict for an unsuccessful defendant in the District Court on a ground neither specified nor stated in defendant's

motions for a directed verdict and judgment notwithstanding the verdict; (2) whether a Court of Appeals has the power to reverse the ruling of a District Judge or a verdict of a jury and direct entry of judgment for a losing defendant by either applying to the facts a legal theory different from the one on which the parties proceeded in the trial court or for the first time assigning decisive importance to the choice by the losing defendant of a legal theory on which to resist recovery; and (3) whether a Court of Appeals has the power to weigh conflicting inferences and judge the credibility of witnesses.

A.

On the first issue the decision of the Court below is in conflict with the

holding of this Court that a Court of Appeals is without power to order the entry of final judgment for the loser of a jury verdict in the District Court where he fails to comply with Rule 50(b) of the Federal Rules of Civil Procedure.

Johnson v. N.Y., N.H. & H.R.R. Co., 344 U.S. 48 (1952);

Fountain v. Filson, 336 U.S. 681 (1949);

Globe Liquor Co. v. San Roman, 332 U.S. 571 (1948);

Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212 (1947).

The rationale for requiring compliance with Rule 50(b) is, as stated by Mr. Justice Black in Johnson, supra, "firmly grounded in principles of fairness," 344 U.S. at page 53.

The rationale of the foregoing cases applies with equal force to the instant

case. Here, the Court below reversed the trial judge's denial of respondent's motions for a directed verdict and judgment notwithstanding the verdict, not on the ground stated in the motions, but on a new and different ground, contrary to the requirement of Rule 50(a) that "A motion for a directed verdict shall state the specific grounds therefor." Respondent's motions at trial rested upon the ground that there was no evidence that respondent's common billing practice exculpatory of petitioner's guilt existed and therefore it was not liable for malicious prosecution in not disclosing such information to the prosecutor when it instigated the criminal prosecutions. The Court of Appeals, however, determined that there was a

conflict in the evidence as to this ground, but nevertheless proceeded to reverse on a new and different ground, to wit, that there was no evidence that the railway police had knowledge of such practice.

Although the precise issue of whether a Court of Appeals has the power to reverse and direct a verdict for a losing party in the District Court where such party does not comply with the requirement of Rule 50(a) has not been decided by this Court, the same principles of fairness requiring compliance with Rule 50(b) should govern the decision herein as to Rule 50(a).

The allowance of the petition in this case would afford this Court the opportunity to resolve the problems

involved herein on an important question of federal procedural law and appellate review, which has not been, but should be, settled by this Court.

B.

On the second issue the decision of the Court below is in direct conflict with the long-established principle of law that an appellate court is without power to reverse the decision of a trial court by directing judgment in favor of a losing defendant on a new and different theory of defense from that raised or asserted in the trial court.

Weade v. Dichmann, Wright & Pugh, Inc., 337 U.S. 801 (1949);

Canal & C.S.R. Co. v. Hart, 114 U.S. 654 (1885);

Morrill v. Jones, 106 U.S. (1883);

Bates v. Coe, 98 U.S. 31
(1878)

U.S. v. Le Baron, 60 U.S.
73 (1856);

Bell v. Bruen, 42 U.S. 169
(1843);

Gardner v. Meyers, 491 F.2d
1184 (8th Cir. 1974);

American Lease Plans, Inc.
v. Houghton Const. Co.,
Inc., 492 F.2d 34 (5th
Cir. 1973);

Wagner v. Retail Credit Co.
338 F.2d 598 (7th Cir.
1964);

Bramlett v. Young, 229 S.C.
519; 93 S.E. 2d 873 (1956).

In the instant case, as appears from the facts set forth in the Statement of the Case, petitioner proceeded in the trial court against respondent for acting without probable cause in instigating the criminal prosecutions and tortiously interfering without justification

with the contractual relationship between petitioner and his employer on the theory that the billing practices of respondent were exculpatory of any criminal guilt on petitioner's part and the failure to disclose this material information to the prosecuting authorities was evidence of lack of probable cause for instigating the criminal prosecutions and lack of justification for causing petitioner's discharge from employment. Respondent proceeded with its defense to the causes of action on the theory that the alleged billing practices of respondent exculpatory of petitioner's criminal guilt did not exist and therefore there was no exculpatory fact which respondent could have disclosed to the prosecuting authorities evidencing lack of probable cause

for instigating the criminal prosecutions or lack of justification for causing petitioner's discharge from employment.

The Court of Appeals, however, in reversing, applied a new and different theory, to wit, that the railway police did not have knowledge of the billing practices and therefore respondent was not liable on any of the causes of action.

In deciding the case on a new and different theory from which the parties proceeded in the trial court, the Court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

C.

On the third issue the action of the Court below constituted an invasion

of the province of the jury contrary to
the Seventh Amendment to the United States
Constitution.

The Court below, in reversing, under-
took to direct entry of judgment under the
assumption that (1) the testimony of re-
spondent's railway police that they did
not have knowledge of respondent's billing
practice was uncontradicted; (2) the
testimony of respondent's railway police
was credible and therefore conclusive;
and (3) lack of knowledge by the railway
police of the billing practices was a
complete defense to petitioner's causes
of action, constituting probable cause
for instigating the criminal prosecutions
and justification for causing the peti-
tioner's termination of his contractual
employment relationship with his employer.

Petitioner challenges both the power and assumption of the Court below. He submits that the testimony of respondent's railway police was contradicted by the evidence of record that the railway police themselves participated in the practice and the practice was so widespread that the fair inference therefrom was that they knew or at the least should have known of the practice. He also submits that by reason of such contradiction, the stonewalling tactics of the railway police in withholding documentary evidence during discovery proceedings and trial (App. 45-47), their evasiveness, their interest in the case and their manner of testifying, raised issues of credibility, which was for the jury to determine.

That it would be an undue invasion of the jury's historic function for an appellate court to review the case in the light most favorable to the party moving for a directed verdict, judge the credibility of witnesses, and weigh the conflicting inferences and conclusions that may be drawn from the testimony, is an established rule of judicial review.

Wilkerson v. McCarthy, 336 U.S. 53 (1949);

Lavender v. Kurn, 327 U.S. 645 (1946);

Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620 (1944);

Tennant v. Peoria & Pekin Union R. Co., 321 U.S. 29 (1944).

It is also well settled that testimony of a witness, even if not contradicted by adverse testimony of other

witnesses, raises an issue of credibility which is for a jury to determine where the witness has an interest in the outcome of the case, Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, his testimony is contradictory, evasive, equivocal, clouded with uncertainties and generalities, or his manner of testifying gives rise to doubts of his sincerity, Quock Ting v. U.S., 140 U.S. 417.

Here, the Court below, in directing entry of judgment for respondent railway company, contrary to established principles of law and invading the province of the jury, weighed the conflicting inferences, judged the credibility of the witness and viewed the evidence in the light most favorable to the respondent.

Petitioner also submits that assuming, arguendo, the only reasonable inference from the testimony is that the railway police did not have knowledge of the billing practices of respondent railway company, it is clear that such conclusion would have no legal efficacy as a defense to petitioner's causes of action. This is so because, as the record reflects and as determined by the Court of Appeals, there was a conflict in the evidence on the crucial issue raised by the theory on which the parties proceeded in the trial court of whether the aforescribed billing methods of respondent was a common practice. If found a common practice, as the evidence reflects, the necessary conclusion, or, at the least, the fair inference therefrom

is that respondent had knowledge of such exculpatory information which it withheld and failed to disclose to the prosecuting authorities when it instigated the criminal prosecutions. Moreover, it cannot be reasonably contended that where knowledge by a corporation is an element of a tort for which a corporation may become liable, such corporation, possessed of such knowledge, may be absolved or exculpated from liability by claiming that the tort was committed by its agent who was without the knowledge possessed by the corporation and its other agents.

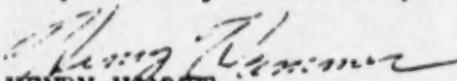
The allowance of the petition in this case would give this Court the opportunity to reaffirm and emphasize the long established rule of judicial review that an appellate court is not

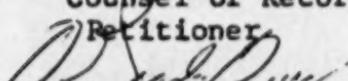
empowered to invade the province of the
jury in violation of constitutional
standards of appellate review.

CONCLUSION

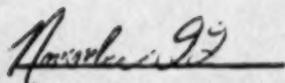
For the foregoing reasons, this
petition for writ of certiorari should be
granted and the judgment of the Court of
Appeals should be reversed.

Respectfully submitted,


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